

BEFORE THE
FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

IN THE MATTER OF AN APPROVAL BY)
DEPARTMENT OF NATURAL RESOURCES)
OF THE FOREST PRACTICES)
APPLICATION OF CHAMBERLAIN FARMS,)

FRED OWENS,)

Appellant,)

FPAB No. 87-6

and)

BLUE HERON ASSOCIATION and the)
SWINOMISH TRIBAL COMMUNITY,)

Intervenors,)

v.)

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

STATE OF WASHINGTON, DEPARTMENT)
OF NATURAL RESOURCES and)
CHAMBERLAIN FARMS,)

Respondents.)

This matter, the appeal of an approval by Department of Natural Resources of the forest practices application of Chamberlain Farms, came on for hearing before the Forest Practices Appeals Board, Norman L. Winn, Chairman, Claudia K. Craig and Dennis C. LeMaster, Members, convened at Mount Vernon, Washington on January 25, 1988, and at Seattle, Washington, on January 26 and 27, 1988. William A. Harrison, Administrative Appeals Judge, presided.

1 Appellant appeared by Jeffrey Jon Bode, Attorney at Law.
2 Respondent Department of Natural Resources appeared by Robert K.
3 Costello, Assistant Attorney General. Respondent Chamberlain Farms
4 appeared by Ann Forest Burns, Attorney at Law. Intervenor Blue Heron
5 Association was represented by Richard A. DuBey, Attorney at Law.
6 Intervenor Swinomish Tribal Community was represented by Allan E.
7 Olson, Attorney at Law.

8 The appellant has elected an informal hearing pursuant to RCW
9 76.09.230. Therefore, these proceedings were not stenographically
10 recorded.

11 Witnesses were sworn and testified. Exhibits were examined. From
12 testimony heard and exhibits examined, the Forest Practices Appeals
3 Board makes these

14 FINDINGS OF FACT

15 I

16 This matter concerns a proposal for logging in Skagit County.

17 II

18 The site is near the mouth of the North Fork of the Skagit River,
19 about 3 miles south of LaConner.

20
21
22
23
24
25
26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
27 FPAB No. 87-6

1 III

2 The landowner and applicant is Chamberlain Farms. The Chamberlain
3 Farms' property consists of some 580 acres of which 200 acres are in
4 timber and the balance in crop land.

5 IV

6 The site in question is generally located on a knoll bordered on
7 one side by the River and on the other by cultivated fields. Other
8 forest lands and rural homesites are nearby, as well.

9 V

10 Members of the Swinomish Tribe fished near the site in ancient
11 times. They established a fishing village which remained in use until
12 relatively modern times. The Chamberlain family ownership extends
back before statehood, and thus overlaps with the time of the fishing
14 village whose last Indian residents moved away in the 1930's. In the
15 1930's or 40's the old fishing village, which came to be known as
16 Fishtown, was discovered by artists and poets who drew upon the
17 inspiration provided by the seclusion and beauty of the area. The
18 Chamberlain family permitted artists and others to live in rustic
19 homes or shelters at Fishtown in exchange for nominal rent. Although
20 logged at least twice in the past the site has trees which are
21 relatively older than found elsewhere in the area.

VI

On September 17, 1987, Chamberlain Farms filed a forest practices application with the Washington State Department of Natural Resources (DNR) office at Sedro Woolley. That application was for clear-cut logging of approximately 80 acres (although erroneously estimated as 55 acres on the application). The site would be reforested with Douglas-fir planted 600 stems per acre.

VII

In keeping with routine procedure, the DNR cross-checked the Chamberlain application with information contained in a multi-agency computerized record known as the "TRAX" system. The purpose of this cross-check was to determine whether any threatened or endangered species of wildlife or any archeological site was known and recorded within the logging site.

VIII

The TRAX cross-check revealed the presence of a threatened or endangered species. This information was made known to the Washington State Department of Wildlife (Wildlife). The DNR directed Chamberlain Farms to consult with the Department of Wildlife.

IX

A Wildlife agent then met with the Chamberlain Farms' forester on the site on September 25, 1987. The Wildlife agent pointed out a Bald Eagle's nest within the 80 acres to be logged. It was this nest which had given rise to the TRAX indication of a threatened species.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
FPAB No. 87-6

X

The Wildlife agent informed Chamberlain's forester that a Bald Eagle management plan would be put into effect to prevent the logging from adversely affecting the nest or its inhabitants. However, in reliance upon the U.S. Fish and Wildlife Service's determination that the critical habitat associated with a Bald Eagle's nest does not exceed a 660' radius from the nest, the Wildlife agent and Chamberlain's forester agreed that logging would proceed outside that radius. It is the opinion of the Wildlife agent that this same radius encompasses the breeding grounds associated with the nest, and that such a radius is a complete safeguard to the nesting eagles. Pursuant to the decision that there was a critical eagle habitat, a Bald Eagle Management plan was prepared pursuant to WAC 232-12-292. Logging would be allowed pursuant to a) timing restrictions, and b) a Class IV forest practices application.

XI

Consistent with its agreement with Wildlife, Chamberlain Farms withdrew its initial forest practices application and filed another in its place on October 1, 1987. The October application proposed logging outside the 660' radius which reduced the acreage from 80 to 60 acres.

XII

On October 14, 1987, DNR approved the Chamberlain Farms' October application. The DNR classified it as Class III which exempted it from the procedural requirements of the State Environmental Policy Act.

XIII

The TRAX cross-check which revealed the Bald Eagles' nest did not reveal any archeological concern. However, following the hearing in this matter during which archeological testimony was received, counsel for DNR inquired further into the operation of the TRAX system. It was only then discovered that DNR had inadvertently errored in operating the TRAX system, and that the computer check yielded a negative archeological result when in fact a positive result should have been displayed. Immediately prior to approving Chamberlain's application, DNR telephoned the Director of OAHF and described the proposal verbally to him. This was pursuant to a request made by the Swinomish Tribal Community. Earlier, Chamberlain Farms had reduced the harvest area in consideration of tribal concern. No copy of the Chamberlain application was provided by DNR to OAHF.

XIV

The Chamberlain forest practices application included a map of the proposal which lacked topographical features, lacked a statement of its scale and contained two distinct lines, each purporting to be the cutting line with respect to the eagle's nest. The map also seems to

1 indicate the presence of a black top county road where there is none,
2 as DNR learned by visiting the site.

3 XV

4 Despite the 660' eagle protection line in this forest practices
5 approval, the Wildlife agent proceeded to issue a final Eagle
6 Management Plan to Chamberlain Farms which established a 330' eagle
7 protection line. The Wildlife agent marked the 330' line on the
8 ground with engineer's tape. Without any forest practices approval,
9 Chamberlain Farms then proceeded to cut timber to the 330' line and
10 also constructed a haul road between the 660' and 330' lines. The DNR
11 has issued a stop work order for forest practices closer to the nest
12 than the 660' line. The stop work order apparently requires a
separate and further forest practices application, after the fact.

14 XVI

15 On October 29, 1987, appellant Fred Owens filed a Notice of Appeal
16 of DNR's October approval of Chamberlain's forest practices
17 application. Blue Heron Association and the Swinomish Tribal
18 Community have intervened by separate orders as parties appellant.

19 XVII

20 Subsequent to the hearing in this matter, intervenor Swinomish
21 Tribal Community requested the state Department of Ecology (DOE) to
22 inspect, and locate on the site, the boundaries of "shorelines of
23 statewide significance" as that term is used in the state Shoreline
24

1 Management Act, chapter 90.58 RCW. The DOE did so with the
2 cooperation of Chamberlain Farms. The forest practices approval at
3 issue is partially within the area which DOE has determined to be
4 shorelines of statewide significance along the Skagit River.
5 Chamberlain Farms has agreed not to conduct forest practices within
6 those shorelines pending our final order. The Swinomish Tribal
7 Community also sought and was granted a restraining order by which we
8 suspended the forest practices approval temporarily in adjacent
9 uplands which probably contain Indian burials. ¹

10 XVIII

11 Any Conclusion of Law deemed to be a Finding of Fact is hereby
12 adopted as such.

13 From these Findings of Fact the Board comes to these
14
15
16

17 ¹ On March 28, 1988, respondent Chamberlain Farms presented its
18 "Motion to Dissolve Suspension of Forest Practices" with attached
19 Declarations alleging that Department of Ecology has, as of March 22,
20 1988, located an "ordinary high water mark" in a different location
21 than it had done previously in February, 1988. Assuming the truth of
22 this allegation, however, it is not inconsistent with the earlier
determination of DOE that the harvest area at issue is partially
within shorelines of the state. The limit of such shorelines was not
addressed by DOE in its March 22, 1988, determination. The said
motion, which related to our preliminary suspension pending this final
Order, was denied.

23 The suspension contained within this final Order shall remain in
24 effect pending the decision of Skagit County under the Shoreline
25 Management Act. Thereafter, the decision of Skagit County shall
control forest practices activities on the site.

26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
27 FPAB No. 87-6

1 CONCLUSIONS OF LAW

2 I

3 The issues herein are set forth in the Pre-Hearing Order entered
4 December 21, 1987. There are now five issues remaining for decision,
5 the rest having been dismissed on motion by respondents when
6 appellants failed to present a prima facie case. The five remaining
7 issues are:

8 1. Whether appellants have standing to appeal this forest
9 practice application as a "person aggrieved" under the Forest
10 Practices Act, RCW 76.09.220?

11 2. Whether the proposed forest practice should have been
12 classified as Class IV (or Class IV Special) under the criteria
13 relating to Bald Eagles. (WAC 222-16-050(1)(b))?

14 3. Whether the proposed forest practice would protect eagle nests
15 in accordance with WAC 222-30-020(6)?

16 4. Whether the proposed forest practice was properly communicated
17 to the Office of Archeology and Historic Preservation as required by
18 WAC 222-20-100(3)?

19 5. Whether the application should have been disapproved as
20 inaccurate, WAC 222-20-040(1)(a)?

21 We now take up these issues in turn.
22
23
24

II

Standing. By separate order we have held each appellant and intervenor herein to possess standing. Motions for Reconsideration filed by respondent, Chamberlain Farms were considered and are now denied.

III

Whether the Forest Practice was Class IV?

The forest practices regulations require:

WAC 222-16-050 Classes of forest practices. There are 4 classes of forest practices created by the act. These classes are listed below in the order most convenient for the applicant's use in determining into which class his operations fall. All forest practices (including those in Classes I and II) must be conducted in accordance with the forest practices regulations.

(1) "Class IV - Special." Application to conduct forest practices involving the following circumstances requires an environmental checklist in compliance with the state environmental policy act (SEPA), and SEPA guidelines, as they have been determined to have potential for a substantial impact on the environment. It may be determined that additional information or a detailed environmental statement is required before these forest practices may be conducted.

(a) . . .

(b) Harvesting, road construction, site preparation or aerial application of pesticides:

(i) On lands known to contain a breeding pair or the nest or breeding grounds of any threatened or endangered species; or

(ii) Within the critical habitat designated for such species by the United State Fish and Wildlife Service. (Emphasis added).

1 The application as re-submitted by Chamberlain in October excluded
2 the lands and habitat specified above and is a Class III, not a Class
3 IV application. Our conclusion in this regard proceeds from the fact
4 that the application and its approval stop at the 660' eagle
5 protection line. That is the approval before us for review. Nothing
6 herein condones the road building and timber cutting conducted by
7 Chamberlain Farms within the eagle managment area closer to the
8 eagle's nest than the 660' line set forth in the application and
9 approval before us.

10 IV

11 Bald Eagle Nest. The forest practices regulations provide, in
12 pertinent part, at WAC 222-30-020(6);

14 (6) Wildlife habitat. This section is designed to
15 encourage timber harvest practices that would
16 protect wildlife habitats, provided, that such
17 action shall not unreasonably restrict landowners
18 action without compensation.

16 (a) The applicant should make every reasonable
17 effort to cooperate with the department of game to
18 identify key wildlife habitats as defined by the
19 board. Where these habitats are known to the
20 applicant, they shall be identified in the
21 application or notification.

19 (b) Where a key wildlife habitat has been
20 identified the applicant shall consider reasonable
21 means of protection thereof as part of the proposed
22 harvesting operation.

21 The nest of the Bald Eagle is a key wildlife habitat. Forest
22 Practices Board Manual, p.8. The October application which is before
23

us for review, and which stops at the 660' eagle protection line, is consistent with the cited requirement for protection of the Bald Eagle nest. Our jurisdiction in this matter does not extend to the forest practices conducted beyond the scope of this application. Again, nothing herein condones those forest practices. Moreover, we cannot perceive the logic by which the applicant and DNR apparently reserved the 660' area for scrutiny under a further Class IV forest practices application; yet, before that application was filed or consideration given under SEPA, the Department of Wildlife issued a purportedly final management plan involving timber harvesting within the 660' area (Exhibit R-5).

V

Archeology. The forest practices regulations provide at WAC 222-20-100(3):

(3) DNR to provide information to OAHP. The department shall provide the office of archeology and historic preservation (OAHP) with copies of all applications and notifications for forest practices to be conducted on lands known to contain historic or archeological resources as identified by OAHP. (Emphasis added).

The normal means for determining known archeological resources as identified by OAHP is DNR's TRAX computer search. In this case, counsel for DNR has made a forthright admission that the TRAX computer said "no" when it should have said "yes" regarding archeology. This

1 was the result of inadvertent error by DNR which was not discovered
2 until after the hearing. The discovery and disclosure of this error
3 was in keeping with the best tradition of public service both as to
4 DNR and the Assistant Attorney General handling the matter. In light
5 of that disclosure it is proper to require that a copy of the
6 application in question be provided to the Office of Archeology and
7 Historic Preservation.

8 VI

9 Accuracy of the Application. Under the Forest Practices act of
10 1974, the scope and extent of authorized forest practices are defined
11 only by the contents of an approved application. Efficient operation
12 of the system of forest practices approval demands that applications
be complete and contain sufficient detail to apprise the applicant,
14 the DNR, other public agencies with jurisdiction and interested
15 members of the public as to what forest practices have been approved.
16 Neither the comment nor enforcement process may function efficiently
17 without accurate applications. Neither, on review, can this Board or
18 a court determine consistency with pertinent rules and statutes
19 lacking an accurate application. See Hayes v. Yount, 87 Wn.2d 280,
20 295, 552 P.2d 1038, 1047 (1976). An accurate application becomes even
21 more important with the adoption, subsequent to this case, of the TFW
22 regulations. We turn now to the application before us which includes
23 both map and text which we will address separately.

1 Accuracy of the Application Map. The Forest Practices Act at RCW
2 76.09.060 states that the DNR shall prescribe the form and contents of
3 the forest practices application. It goes on to provide that the
4 information "may" include "topographic maps." RCW 76.09.060(1)(d).
5 See also WAC 222-20-010(3) allowing DNR to prescribe the form of
6 applications. The forest practices regulations then require the
7 application to be "complete" and "accurate" prior to approval. WAC
8 222-20-040(1)(a).

9 The map in this instance was sufficiently discernable for us to
10 conclude that it was complete and accurate with regard to the issues
11 before us. However, this map constitutes minimal compliance with the
12 Act. No map like this one can be employed in the future with any
13 confidence that it will meet WAC 222-20-040(1)(a) in future cases.
14 Future forest practices application maps should:

- 15 1. Use map symbols which are clearly distinct from another.
- 16 2. Show topographic features.
- 17 3. Bear an explicit statement of the scale to which the map is
18 drawn and be drawn to scale.

1 We are aware of the effort made by DNR to confer with the operator "on
2 the ground" to explain forest practices which have been authorized.
3 Such conferences, however, may exclude interested members of the
4 public where, as here, the conference is on private property. Such
5 conferences may not, as here, involve all other public agencies with
6 jurisdiction such as Skagit County or the Department of Ecology. Such
7 conferences may result in a failure of communication between the DNR
8 and the forester or operator as may have occurred here regarding the
9 unauthorized forest practices within the Bald Eagle habitat.² We
10 therefore stress that verbal conferences are not a substitute for a
11 complete, accurate, approved application in writing under WAC
12 222-20-040(1)(a), and that this is particularly true with regard to
13 the map component of the application. Other public agencies and
14 members of the public generally do not participate in conferences and
15 rely exclusively on the accuracy of the information contained in the
16 approved application.
17
18
19

20 2 We would urge DNR to provide copies of the approved forest
21 practices application, including the map, to the operator, the
22 forester and other principal vendors of forestry services and the
23 landowner.
24
25

1 Accuracy of the Application Text. In light of the shoreline
2 determination of the Department of Ecology after the hearing in this
3 matter, the application should be remanded for the purpose of
4 indicating that a portion of these forest practices are within
5 shorelines of the state (Box 21 of the application). When shorelines
6 of the state are involved, the County possesses authority under the
7 Shoreline Management Act to regulate forest practices. Weyerhaeuser
8 v. King County, 91 Wn. 2d 721, 592 P.2d 1108 (1979). Each application
9 of this kind should therefore have the following admonition typed or
10 printed in the "Conditions" section of the application at the time of
11 approval:

12 This application involves shorelines of the
13 state. Before conducting any forest practices under
14 this application, the applicant should contact the
 county to insure compliance with the State Shoreline
 Management Act, chapter 90.58 RCW.

15 We deny the motion of the Swinomish Tribal Community to amend the
16 pleadings in this matter to embrace Shoreline Management Act issues.
17 These are better left to County interpretation with the support of the
18 Department of Ecology.

19 VII

20 The effect of the admonition which we prescribe in Conclusion of
21 Law VI, above, is only to cause the applicant to inquire of the County
22 concerning the Shoreline Management Act (SMA). It does not operate in
23 itself to stay the forest practices approval. Whether that approval
24

25 FINAL FINDINGS OF FACT,
26 CONCLUSIONS OF LAW & ORDER
27 FPAB No. 87-6

1 should be stayed depends upon the facts of each case. In this case,
2 as in Merkel v. Port Brownsville, 8 Wn. App 844, 509 P.2d 390 (1973),
3 a determination has been made that the proposed activity is both
4 within and without the shoreline. As in Merkel it appears that a
5 prior approval or permit is required for the shoreline portion of the
6 activity. This arises from the SMA at RCW 90.58.150 which requires
7 counties to limit timber harvesting to selective cutting on shorelines
8 of statewide significance. If applicable, this provision would be in
9 conflict with the forest practices approval before us which allows
10 clear-cutting. The shoreline portion of this forest practice approval
11 should therefore be suspended pending SMA approval by Skagit County.

12 Unlike Merkel, the upland portion of these forest practices can be
13 conducted independently of the shoreline portion. Yet the coercive
14 effect of logging the uplands is present in this matter, as in Merkel,
15 the limited area identified as ". . . all lands in section 7, Township
16 22, Range 3 East, westerly of the 50 foot contour that intersects the
17 eastern boundary of the above section" as set out in the "Order
18 Suspending Forest Practices Approval, In Part" entered February 19,
19 1988. These are uplands adjacent to the shoreline which the Swinomish
20 Tribal Community has, by affidavit, identified as burial grounds.
21 These grounds extend continuously into the shoreline. Skagit County
22 must now determine the degree of protection, if any, afforded the
23 grounds under the SMA and shoreline master program. That

1 determination should preceed, rather than follow, the proposed timber
2 harvest upon the upland portion of these grounds. The forest
3 practices approval in those adjacent uplands described above should be
4 suspended pending SMA approval by Skagit County.

5 VIII

6 Any Finding of Fact deemed to be a Conclusion of Law is hereby
7 adopted as such. From these Conclusions of Law the Board enters this
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORDER

The application of Chamberlain Farms is remanded to the Department of Natural Resources with instructions to:

1. Provide a copy of the application to the Office of Archeology and Historic Preservation.

2. Re-issue the approved application in the same form as previously, but with the shorelines checkmark (Box 21) and the typed or printed shoreline admonition set forth in Conclusion of Law VI, hereof.

As so re-issued, the approval is affirmed; provided, however, the same is suspended as to the area determined to be within shorelines of the state and adjacent uplands described in Conclusion of Law VII, hereof, pending approval under the State Shoreline Management Act by Skagit County.

This affirmance shall not be construed as approval of activities beyond the scope of this forest practices application or of activities beyond the scope of the jurisdiction of this Board.

DONE at Lacey, WA, this 1st day of April, 1988.

FOREST PRACTICES APPEALS BOARD

Norman L. Winn
NORMAN L. WINN, Chairman

Claudia K. Craig
CLAUDIA K. CRAIG, Member

Dennis C. LeMaster
DENNIS C. Le MASTER, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
FPAB No. 87-6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

BEFORE THE
FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

FRED OWENS,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF NATURAL RESOURCES and
CHAMBERLAIN FARMS,

Respondents.

FPAB No. 87-6

ORDER AMENDING
FINDINGS OF FACT

On April 8, 1988, respondent Chamberlain Farms filed its Motion to amend Findings of Fact.

Having considered the same together with the response of the other parties herein and being fully advised the Board concludes that the Motion should be granted to the extent represented by the substitute Finding of Fact V attached hereto.

The substitute Finding of Fact V, is the result of reconsidering the evidence presented at hearing together with the argument of counsel. The affidavit and other attachments to this Motion and reply were neither evidence, herein, nor the basis for reopening the hearing, and were not considered.

DONE at Lacey, WA this 27th day of June, 1988.

FOREST PRACTICES APPEALS BOARD

Norm L Winn
NORM WINN, Member

Claudia K. Craig
CLAUDIA CRAIG, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

ORDER AMENDING
FINDINGS OF FACT
FPAB No. 87-6

III

The landowner and applicant is Chamberlain Farms. The Chamberlain Farms' property consists of some 580 acres of which 200 acres are in timber and the balance in crop land.

IV

The site in question is generally located on a knoll bordered on one side by the River and on the other by cultivated fields. Other forest lands and rural homesites are nearby, as well.

V

Indigenous Indian peoples populated the area in ancient times. The Swinomish Indian Tribe have exercised their treaty fishing rights along the Skagit River near the site, and some Indians remained until the 1930's. The Chamberlain family ownership extends back before statehood. In the 1970's the old fishing village, which came to be known as Fishtown, was known to artists up and down the West Coast. The Chamberlain family permitted artists and others to live in rustic homes or shelters at Fishtown in exchange for nominal rent. Although logged at least twice in the past the site has trees which are relatively older than found elsewhere in the area.